Supreme Court, U.S.
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No. 99-804

IN THE

Supreme Court of the United States

CARL W. CLEVELAND,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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71 pp

QUESTION PRESENTED

Can alleged false statements or omissions in applications for state licenses be the basis for federal mail or wire fraud charges, on the theory that a State is deprived of "property" when it issues a license?

LIST OF PARTIES

Petitioner Carl W. Cleveland was a defendant in the District Court and an appellant in the Court of Appeals. Respondent, who was plaintiff in the District Court and appellee and cross-appellant in the Court of Appeals, is the United States. Also defendants in the District Court and appellants in the Court of Appeals were Fred H. Goodson, Maria Goodson, and Larry S. Bankston. In addition, Mr. Bankston and Ms. Goodson were cross-appellees. Intervenors in the forfeiture proceedings in the District Court and appellants in the Court of Appeals were Maria Goodson, Alexandros F. Goodson, and Truck Stop Gaming, Inc.

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OPINIONS BELOW

The opinion of the District Court is reported at 951 F. Supp. 1249 and is reproduced in the Appendix to the Petition for Certiorari ("Pet. App.") at 52a. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 182 F.3d 296 and is reproduced at Pet. App. 1a.

JURISDICTION

The judgment of the District Court was entered on October 20, 1997. R.[1] 8614. The judgment of the Court of Appeals was entered on July 21, 1999. Pet. App. 1a. Petitioner's timely petition for rehearing was denied on September 2, 1999. Pet. App. 45a. The petition for certiorari was filed on November 9, 1999. The petition was granted on March 20, 2000 as to the question now presented in this brief. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal mail fraud statute, 18 U.S.C. § 1341, and pertinent parts of the Louisiana video poker statute, La. Rev. Stat. Ann. §§ 33:4862.1(D), :4862.6(A), :4862.8, :4862.9, :4862.10 & :4862.11 (West Supp. 1996), are reproduced at pages 1a-11a, *infra*.

STATEMENT

A. The Formation of Truck Stop Gaming.

In July 1991, the Louisiana legislature enacted a law allowing the operation of video poker machines at certain business establishments, including truck stops. *See* Video Draw Poker Devices Law, 1991 La. Sess. Law Serv. Act 1062 (West) (codified as amended at La. Rev. Stat. Ann. §§ 33:4862.1–4862.23 (West Supp. 1996)). Under regu-

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[1] "R." denotes the Record in the Court of Appeals, "T." the trial transcript, "GX" a Government exhibit, and "CX" a Cleveland exhibit.

lations issued shortly thereafter, each truck stop was limited to 50 machines. *See* La. Admin. Code, tit. 55, § 2415(A)(1)(e)(i) (1992).

Fred Goodson had been in the truck stop business in Slidell, Louisiana for 20 years. *See* Pet. App. 2a. In February 1992, with the help of a New Orleans law firm, Cleveland, Barrios, Kingsdorf & Casteix, Fred Goodson's family formed a limited partnership, Truck Stop Gaming, Ltd. ("Truck Stop Gaming"), that would operate video poker machines at the Slidell truck stop and other truck stops. *See id.* The law firm had represented Fred Goodson in litigation matters since 1989 (and would continue to do so); those matters had been handled by petitioner Carl Cleveland, a trial lawyer who had practiced law in New Orleans since 1966. T. 4040-41, 4065-66. Cleveland asked one of his partners, a corporate lawyer, to prepare the documents necessary to form Truck Stop Gaming. T. 4083-84; GX 2A.

As he had done with two other family businesses, T. 3532, 3535-36, Fred Goodson made his adult children, Alex and Maria Goodson, the owners of Truck Stop Gaming, while he retained control over its operations. The legal entity used to accomplish these purposes was a partnership *in commendam,* a form of limited partnership under Louisiana law. *See* Pet. App. 2a. Alex and Maria were the limited partners of Truck Stop Gaming.[2] *See id.* In 1992 Maria was 23 years old and a student at Tulane University. GX 5. Her brother Alex was 28 years old and managed a Hardee's fast-food restaurant owned and operated by the Goodsons as a family business. *Id.* After Maria and Alex signed the partnership agreement

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[2] In that capacity, Alex Goodson and Maria Goodson each held a 49% ownership interest. GX 2A. The general partner of Truck Stop Gaming, holding a 2% ownership interest, was a corporation of which Maria and Alex were the sole shareholders. GX 1, 2A. Fred Goodson was the General Manager of the partnership. GX 5.

establishing Truck Stop Gaming, the agreement was filed with the Secretary of State as required by Louisiana law. *See* Pet. App. 3a.

The start-up capital that Alex and Maria Goodson invested in the new partnership was provided to them in two loans of $245,000.[3] One loan was from Fred Goodson to Alex Goodson, and the other from the law firm to Maria Goodson. GX 5; *see* Pet. App. 3a. When the law firm made its loan to Maria Goodson, Cleveland and Fred Goodson discussed the possibility that, if things worked out to the satisfaction of the Goodson family, and if partners of the law firm wanted to do it, at some point the loan, accrued interest, and any accrued legal fees might be converted to an ownership interest in Truck Stop Gaming. T. 4085; *see also* T. 1273-74, 3788, 4006.

B. The License Applications.

The new Louisiana video poker statute required prospective owners of video poker devices to obtain licenses from the Louisiana State Police. *See* La. Rev. Stat. Ann. § 33: 4862.6 (West Supp. 1996). A prospective device owner was required to complete a license application and await the approval of the State Police. *See* La. Admin. Code, tit. 55, § 2405 (1992). All licenses expired on June 30 of each year and had to be renewed to remain valid. *See id.*, § 2405(A). Licenses were not transferable. *See* La. Rev. Stat. Ann. § 33:4862.11(G) (West. Supp. 1996). Each device owner was required to pay the State $2,000 per year and 22.5% of the net revenue generated by the owner's video poker machines. *See* La. Rev. Stat. Ann. § 4862.11(A), (D) (West. Supp. 1996).

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[3] The corporate general partner of Truck Stop Gaming received an additional $10,000 loan from Fred Goodson.

In February 1992, Truck Stop Gaming applied for its initial device owner license. GX 5. In accordance with the terms of the agreement establishing the partnership *in commendam*, the application identified Alex Goodson, Maria Goodson, and the corporate general partner, *see* note 2, *supra*, as the owners of Truck Stop Gaming. GX 5. As the Court of Appeals noted, "Alex and Maria Goodson were from inception and remain the record owners of [Truck Stop Gaming] and its corporate general partner . . . ." Pet. App. 5a.[4] The applications fully disclosed that all the start-up capital for the partnership had been provided in loans from Fred Goodson and the law firm to Alex and Maria Goodson. *See* Pet. App. 3a; GX 5. Alex and Maria Goodson signed the State's form affidavits attesting, *inter alia*, that they had no agreements or understandings with any other person to hold their interests as agents, nominees, or otherwise. GX 5.

In May 1992, the State Police approved Truck Stop Gaming's application and issued its initial license. GX 6. Truck Stop Gaming submitted renewal applications in 1993, 1994, and 1995, and its license was renewed each time. GX 7-10, 41, 45. Truck Stop Gaming owned and operated video poker machines from 1993 through 1995 and paid the State of Louisiana, as required by law, 22.5% of the net revenue generated by the machines. T. 1017-18, 3800; R. 7911.

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[4] Under the terms of Truck Stop Gaming's partnership agreement, any transfer of ownership was required to be in writing. T. 3435; GX 2A. No such writing reflecting a transfer of ownership to Fred Goodson, Cleveland, or the law firm was ever prepared or executed. T. 2004-05, 2212-13.

C. The Indictment and the Proceedings in the District Court.

The State of Louisiana has never brought any criminal charges based on the submission of any of Truck Stop Gaming's license applications. In 1996, however, the Federal Government made those same applications the linchpin of a multi-count indictment against petitioner and others. R. 416-60.

In four counts of mail fraud, the indictment charged that petitioner, Fred Goodson, and Maria Goodson had executed a scheme to deprive "the State of Louisiana and its citizens" of "property" by "fraudulently obtaining and renewing, through the submission of false and incomplete information, state licenses to operate video poker sites." R. 441.[5] The license applications allegedly failed to disclose "understandings and agreements with unreported parties" and "other factors that could impact the ability of the true owners to obtain licenses." R. 441-42. The mailings underlying the four mail fraud counts were the mailings by the State Police of Truck Stop Gaming's initial license in 1992 and its licenses for 1993, 1994, and 1995. R. 442-43.

The mail fraud charges were the springboard for adding other charges carrying much longer potential sentences. The indictment charged petitioner with five counts of money laundering based on transactions involving proceeds of the alleged mail fraud. R. 444-46. The alleged mail fraud and money laundering, in turn, were identified as predicate acts of racketeering to support RICO and RICO conspiracy counts. R. 422-23. In all, 11 of the 15 counts against petitioner were based in whole or in part on the mail fraud statute.

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[5] An additional defendant, Joe Morgan, an accountant for the Goodson family businesses, was named in two of the mail fraud counts. R. 443. Morgan was acquitted on all counts. R. 95.

The Government also brought a separate charge under 18 U.S.C. § 1955 of conducting an illegal gambling business from April 1993 to July 1995 (on which petitioner was acquitted). R. 443. According to the Government, Truck Stop Gaming's video poker business was illegal under state law–which is an essential element of an offense under § 1955–because the license applications were fraudulent. T. 4503. Thus, the illegal gambling and mail fraud counts rested on virtually identical challenges to the license applications.

On November 15, 1996, Fred Goodson moved to dismiss the mail fraud counts and the corresponding alleged predicate acts of racketeering on the ground that an unissued state license does not constitute property under the mail fraud statute, as a majority of the circuits to consider the question had held. R. 300. Petitioner adopted the motion. R. 285. On January 14, 1997, the District Court denied the motion, stating that "This Court agrees with the First and Third Circuit's conclusion that licenses constitute property even before they are issued." A. 79a. *See also id.* (citing *United States v. Berg*, 710 F. Supp. 438, 444 (E.D.N.Y. 1989) (unissued licenses constitute property), *aff'd in part, rev'd in relevant part sub nom. United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991)).

At trial, the Government advanced four contradictory theories in support of its contention that the license applications were false: (1) Cleveland and Fred Goodson (not Maria and Alex Goodson) owned Truck Stop Gaming, T. 358, 376, 378, 380, 399, 4495-97, 4682, 4685; (2) Maria and Alex Goodson had pledged their ownership interests to Cleveland and Fred Goodson, T. 1052, 2210-11, 2220, 4024, 4166-67, 4170-71, 4682, 4685-86, which assumes—contrary to the first theory—that Maria and Alex Goodson owned Truck Stop Gaming; (3) Cleveland and Fred Goodson held options to acquire from Maria and Alex Goodson the interests that, according to the first theory, Cleveland and Fred

Goodson already owned, T. 923, 2220, 4502, 4682; and (4) Maria and Alex Goodson were parties to agreements or understandings to transfer their ownership interests to Cleveland and Fred Goodson in the future. T. 4500.[6]

The Government contended that Cleveland *personally* held an interest in Truck Stop Gaming. T. 378, 4682, 4685-86. But the only discussions concerning possible acquisition of Maria Goodson's ownership interest had concerned acquisition of that interest by the Cleveland, Barrios, Kingsdorf & Casteix law firm, not by Cleveland personally. T. 4096; CX 1, 4; GX 106. Cleveland held only a 25% interest in the firm. It was the law firm—a partnership and a distinct legal entity under Louisiana law—that had loaned Maria Goodson $245,000 and was providing legal services for Fred Goodson. GX 5; T. 3579, 4065.

The Government asserted that Alex and Maria Goodson were identified on the license applications as owners of Truck Stop Gaming so that the State Police would not conduct suitability investigations of Fred Goodson and Cleveland, who purportedly feared they would be found financially unsuitable. T. 355-56, 375-76, 4496, 4680-81. The applications fully disclosed, however, that the start-up capital for the new video poker business had been provided in loans from the law firm and Fred Goodson, and that the loans were outstanding. GX 5; *see* Pet. App. 3a. The very reason for requiring disclosure of loans on applications for video poker licenses was "for the purposes of determining significant influence and suitability." La. Rev. Stat. Ann. § 33:4862.10(E) (West Supp. 1996). Lenders as well as

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[6] At times the Government advanced several of its contradictory theories *seriatim*. For example, in its rebuttal summation the Government argued that "They didn't report these pledges. They didn't report these options that they had. The bottom line is Fred and Carl owned this company . . . ." T. 4682.

owners were subject to a suitability investigation if the State Police chose to conduct one. T. 957-58, 1004, 1011. Indeed, the State Police did investigate Fred Goodson, T. 1006-07, 1024, and must have found him to be suitable because it issued the licenses.

The jury deliberated for seven days. All defendants were acquitted on the illegal gambling count and two mail fraud counts (based on the license issued in 1992 and the 1993 renewal). R. 90-91.[7] Petitioner was found guilty, however, on the other two mail fraud counts (based on the renewal licenses issued in 1994 and 1995), four money laundering counts, and the RICO and RICO conspiracy counts. R. 90-91.[8] The convictions for money laundering, RICO, and RICO conspiracy all depended on the allegations of mail fraud.

Applying the guideline range for money laundering, the District Court sentenced petitioner, who until this case had never been charged with a crime, to ten years and one month in prison. R. 8614.[9]

D. The Court of Appeals' Ruling.

On appeal, petitioner renewed his contention that an unissued state license is not property under the mail fraud statute. *See* Pet. App. 19a. On July 21, 1999, the Court of

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[7] Petitioner also was acquitted on a charge of participating in or causing interstate communications in aid of racketeering (18 U.S.C. § 1952). R. 91.

[8] Petitioner also was convicted on two tax charges under 18 U.S.C. § 371 and 26 U.S.C. § 7206, R. 91, based on an income tax return filed by Truck Stop Gaming. Those charges had no effect on the length of petitioner's sentence.

[9] Petitioner was denied bail pending appeal and has served 28 months of his sentence. After certiorari was granted, the District Court ordered petitioner released pending the completion of the appeal process, citing, *inter alia*, his "exemplary behavior record while incarcerated." Order and Reasons, April 27, 2000, at 3.

Appeals affirmed petitioner's conviction and sentence. *Id.* 1a. The court rejected petitioner's contention concerning unissued licenses, *id.* 19a, deeming itself bound by *United States v. Salvatore*, 110 F.3d 1131 (5th Cir.), *cert. denied*, 522 U.S. 981 (1997), in which a prior Fifth Circuit panel had held that unissued Louisiana video poker licenses constitute property of the State under 18 U.S.C. § 1341.

SUMMARY OF ARGUMENT

Petitioner Cleveland's mail fraud conviction rests upon an interpretation of the mail fraud statute, 18 U.S.C. § 1341, that is fundamentally inconsistent with this Court's decisions in *McNally v. United States*, 483 U.S. 350 (1987), and *Carpenter v. United States*, 484 U.S. 19 (1987). *McNally* held, and *Carpenter* reaffirmed, that § 1341 is limited to schemes aimed at taking money or property. In 1988 Congress extended the statute to schemes to deprive another of the intangible right of honest services, but otherwise left the money-or-property limitation intact. In this case, however, the Court of Appeals has allowed the Government to predicate mail fraud charges on an alleged scheme that implicated only a state regulatory interest, not money or property.

According to the decision that the Court of Appeals followed here, "Louisiana's right to choose the persons to whom it issues video poker licenses" is property, of which the State is deprived when it issues a license to an applicant who has submitted a false or misleading application. *Salvatore*, 110 F.3d at 1140. This interpretation of the mail fraud statute finds property where there is none. As the Eighth Circuit held in *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990) (R. Arnold, J.), *cert. denied*, 500 U.S. 921 (1991), "A governmental permit may in some sense be property in the hands of the person who receives it, but licensing authorities have no property interest in licenses or permits . . . ." 908

F.2d at 280. Licensing is a method of regulating conduct and raising revenue, not a means by which government property is relinquished. Whether or not a particular license, after it is issued, constitutes property of the licensee–and the Louisiana legislature has declared that a video poker license is not property of the licensee–the government plainly does not part with any of its own property when it issues a license. Nor is the right to select the person to whom the government issues a license property. "From the government's perspective, . . . the license is a promise not to interfere rather than a sliver of property." *Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir. 1989).

The conclusion that a governmental entity is not deprived of property under the mail and wire fraud statutes when it issues a license is supported by decisions of the Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits. *See, e.g., United States v. Schwartz*, 924 F.2d 410, 417 (2d Cir. 1991); *Granberry*, 908 F.2d at 280; *Toulabi*, 875 F.2d at 125. Those decisions involved a variety of licenses, from taxicab licenses to licenses to conduct bingo games. Moreover, the Fourth and Federal Circuits have held that government actions similar to the issuance of a license do not affect the government's interests as a property holder. *See Semiconductor Energy Lab. Co. v. Samsung Elecs. Co.*, 204 F.3d 1368, 1380 (Fed. Cir. 2000); *Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1137 (4th Cir. 1993), *cert. denied*, 510 U.S. 1197 (1994).

The majority view among the circuits is also consistent with the presumption against statutory interpretations that significantly change the balance between federal and state criminal jurisdiction. *See, e.g., Jones v. United States*, 68 U.S.L.W. 4422, 4425 (U.S. May 22, 2000); *United States v. Bass*, 404 U.S. 336, 349 (1971). There are thousands of state and municipal licensing requirements. Equating issuance of a license with a deprivation of property would greatly expand

federal criminal jurisdiction, and would make a wide range of conduct traditionally handled by state or local authorities subject to prosecution under the federal mail or wire fraud statutes.

The majority view in the circuits finds further support in the rule of lenity. Even if the arguments for treating issuance of a video poker license as a transfer of government property were deemed to create ambiguity as to whether the mail fraud statute applies, the rule of lenity would require that the ambiguity be resolved against the more expansive reading of the statute. *See, e.g., Jones*, 68 U.S.L.W. at 4425; *United States v. Granderson*, 511 U.S. 39, 54, 56 (1994); *Ratzlaf v. United States*, 510 U.S. 135, 148 (1994).

Finally, the majority view is supported by the limited scope of the statute Congress enacted in 1988 in response to *McNally*. Prior to *McNally*, lower courts had recognized numerous "intangible rights," including the intangible right of a state agency to run a licensing program free from deception. In *McNally* this Court held that intangible rights not involving money or property cannot be the basis of a mail fraud charge. The following year, Congress restored to the mail fraud statute just a single intangible right, the intangible right of honest services. Congress declined to enact proposed laws that would have restored all or a long list of intangible rights, even though it was aware that indictments charging deception in license applications had been dismissed in reliance upon *McNally*. The only reasonable inference is that, apart from the intangible right of honest services, Congress did not intend mail fraud charges to be predicated on intangible rights, including the intangible right to administer a licensing program based on full and complete information. By treating the regulatory act of issuing a video poker license as a deprivation of property, the Court of Appeals has effectively read that intangible right into the mail fraud statute.

ARGUMENT

I. THE GOVERNMENT DOES NOT PART WITH PROPERTY WHEN IT ISSUES A LICENSE.

A. The Mail Fraud Statute Is Limited to Schemes Calculated To Deprive Another of Money, Property, or the Right of Honest Services.

The mail fraud statute was first enacted in 1872 as part of an omnibus act revising and recodifying the postal laws. Act of June 8, 1872, ch. 355, § 301, 17 Stat. 323. As originally worded, the statute prohibited using the mails in furtherance of "any scheme or artifice to defraud." The sponsor of the recodification, Representative Farnsworth, stated that measures were needed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country." Cong. Globe, 41st Cong., 3d Sess. 35 (1870). In 1909, as part of a general revision of the federal penal code, Congress amended the mail fraud statute by inserting the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" after "defraud," thereby codifying the holding of *Durland v. United States*, 161 U.S. 306 (1896).[10] Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130. Insofar as is pertinent here, the statutory language has remained unchanged since 1909.

Hammerschmidt v. United States, 265 U.S. 182 (1924), was the first decision of this Court to recognize that the mail

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[10] In *Durland* this Court held that the phrase "any scheme or artifice to defraud" was not limited to those frauds satisfying the common law definition of false pretenses, which required "a misrepresentation as to some existing fact and not a mere promise as to the future." 161 U.S. at 312. The Court construed the phrase to encompass "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." *Id.* at 313.

fraud statute is limited to schemes that seek to take money or property. *Hammerschmidt* involved an indictment under the conspiracy-to-defraud clause of the predecessor of 18 U.S.C. § 371, but in its unanimous opinion the Court discussed the words "to defraud" in other statutes, including the mail fraud statute. Those words, the Court observed, "usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching. They do not extend to theft by violence. They refer rather to *wronging one in his property rights* by dishonest methods or schemes." 265 U.S. at 188 (emphasis added). The Court then referred to a lower court decision, *Horman v. United States*, 116 F. 350 (6th Cir.), *cert. denied*, 187 U.S. 641 (1902), which had affirmed a mail fraud conviction based on a letter conveying a threat to blackmail the recipient unless he paid the sender money. This Court stressed that "The decision . . . went to the verge and should be confined to *pecuniary or property injury* inflicted by a scheme to use the mails for the purpose." 265 U.S. at 188-89 (emphasis added). *See also United States v. Cohn*, 270 U.S. 339, 346-47 (1926) (construing word "defrauding" in predecessor of 18 U.S.C. § 1001 as "relating to the fraudulent causing of pecuniary or property loss").

More than 60 years later, the Court disapproved of lower court decisions upholding mail fraud convictions for schemes implicating "intangible rights," and specifically held that § 1341 is "limited in scope to the protection of property rights." *McNally v. United States*, 483 U.S. 350, 360 (1987). The Court also held that the money-or-property limitation applies with equal force when the government is the alleged target of a scheme to defraud. "[T]he mail fraud statute . . . had its origin in the desire to protect individual property rights, and any benefit which the Government derives from the statute must be limited to the Government's interests as property holder." *Id.* at 359 n.8.

In a unanimous opinion the following Term, the Court reaffirmed that the scheme must be calculated to deprive the victim of money or property, but clarified that intangible as well as tangible property suffices. *See Carpenter v. United States*, 484 U.S. 19, 25-27 (1987). The Court held that the mail and wire fraud statutes prohibited a scheme to defraud the Wall Street Journal of confidential business information, because the "intangible nature" of such information "does not make it any less 'property' protected by the mail and wire fraud statutes." *Id.* at 25. The Court concluded that, because "Confidential business information has long been recognized as property," the convictions could stand. *Id.* at 26.

In 1988, the year after *McNally* and *Carpenter* were decided, Congress restored one, and only one, "intangible right" that had been recognized in the lower courts before *McNally*—the intangible right of honest services. It did so by providing that, for purposes of the chapter that includes the mail and wire fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[11]

When a charge of mail or wire fraud does not allege a scheme to deprive another of the intangible right of honest services, *McNally* and *Carpenter* continue to require allegation and proof of conduct calculated to deprive the victim of money or property.[12] In this case, because the

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[11] Anti-Drug Abuse Act of 1988, Pub. L. 100-690, Title VII, § 7603(a), 102 Stat. 4181, 4508 (Nov. 18, 1988) (codified at 18 U.S.C. § 1346).

[12] *See, e.g., United States v. Dinome*, 86 F.3d 277, 283 & n.5 (2d Cir. 1996); *United States v. Adler*, 186 F.3d 574, 576 (4th Cir. 1999); *Salvatore*, 110 F.3d at 1138-39; *Richards v. Combined Ins. Co. of Am.*, 55 F.3d 247, 251-52 (7th Cir. 1995); *United States v. F.J. Vollmer & Co.*, 1 F.3d 1511, 1520 (7th Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994); *United States v. Bruchhausen*, 977 F.2d 464, 467 & n.3 (9th Cir. 1992); *United States v. Shotts*, 145 F.3d 1289, 1292-93 & n.3 (11th Cir. 1998),

indictment did not allege a scheme to deprive the State of Louisiana of money or the intangible right of honest services, the validity of petitioner's mail fraud conviction depends upon whether the alleged scheme to obtain video poker licenses was one calculated to deprive the State of property.[13]

B. The Issuance of a License Is Not a Deprivation of Property.

The State of Louisiana issued the video poker licenses in this case pursuant to a statute enacted in 1991.[14] As one Louisiana court has explained, "The obvious legislative purpose behind [the video poker statute] was to provide a comprehensive framework for the regulation of the video poker industry, vesting regulatory powers exclusively in the video gaming division of the state police." *Southwest Gaming Servs. v. Caddo-Shreveport Sales & Use Tax*

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cert. denied, 525 U.S. 1177 (1999); *Semiconductor Energy Lab. Co. v. Samsung Elecs. Co.*, 204 F.3d 1368, 1380 & n.5 (Fed. Cir. 2000).

[13] In the decision upon which it relied here, the Court of Appeals analyzed the question whether the State parted with property under § 1341 as one of federal law, and did not interpret the statute as incorporating state property law. *See Salvatore*, 110 F.3d at 1142 ("Congress certainly could have defined property solely by reference to state law, but it chose not to do so in § 1341."). In this respect, the decision is consistent with this Court's precedents, which establish that "in the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law." *United States v. Turley*, 352 U.S. 407, 411 (1957); *see Jerome v. United States*, 318 U.S. 101, 104 (1943). Thus, in *Carpenter* the Court's conclusion that confidential business information "has long been recognized as property," 484 U.S. at 26, was based not on New York law, but on its own decisions, a statute, and a general treatise on private corporations. *See id.*

[14] *See* Video Draw Poker Devices Law, 1991 La. Sess. Law Serv. Act 1062 (West) (codified as amended at La. Rev. Stat. Ann. §§ 33:4862.1–4862.23 (West. Supp. 1996)). The current version of the statute appears at La. Rev. Stat. Ann. §§ 27:301–27:324 (West Supp. 2000).

Comm'n, 661 So. 2d 662, 663 (La. Ct. App. 1995), *cert. denied*, 666 So. 2d 294 (La. 1996). The Office of State Police, which is a part of the Department of Public Safety and Corrections, was assigned the responsibility to promulgate regulations concerning the licensing process, and the power to deny, condition, suspend, or revoke licenses; to levy fines of up to $1,000 per violation; and to inspect premises where video poker devices are offered for play. La. Rev. Stat. Ann. § 33:4862.8 (West Supp. 1996). A device owner was required to pay the State $2,000 per year and 22.5% of the net revenue from each device. La. Rev. Stat. Ann. § 33:4862.11(A), (D) (West Supp. 1996). In short, the statute "created an entire regulatory scheme pertaining to [video poker] devices[,] . . . gave extensive regulatory authority to the Department of Public Safety and Corrections, and provided for the payment of fees to the Department in connection with that regulatory scheme." La. Atty. Gen. Op. No. 92-491 (1992).[15]

In the decision upon which it relied in this case, the Court of Appeals held that the State was deprived of property by a scheme to obtain a video poker license through a false or incomplete application, because such a scheme affects "Louisiana's right to choose the persons to whom it issues video poker licenses." *Salvatore*, 110 F.3d at 1140. But the State's right to determine who may receive a license is an aspect of the State's regulatory powers. It is not a property right and therefore cannot support a mail fraud conviction.

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[15] The Department of Public Safety and Corrections is expressly identified as a "gaming industry regulator" in La. Rev. Stat. Ann. § 24:513.3(B)(2). The indictment here itself alleges that the State Police "regulated video poker gaming in the State of Louisiana." R. 418.

1. Licensing Is a Method of Regulating Conduct and Raising Revenue, Not of Transferring Government Property.

Licensing is one of the many techniques governments can use to regulate private conduct and raise revenue. As this Court said in *Wiggins Ferry Co. v. City of East St. Louis*, 107 U.S. 365 (1883), "The power to license is a police power, although it may also be exercised for the purposes of raising revenue." *Id.* at 373. The licensing power is a basic prerogative of government. "The power to regulate occupations and businesses by licensing provisions and by imposing a licensing fee is an attribute of sovereignty." *Newport Amusement Co. v. Maher*, 92 R.I. 51, 56, 166 A.2d 216, 218 (1960).

This Court has often recognized the regulatory nature of licensing. In *Gade v. National Solid Wastes Management Association,* 505 U.S. 88 (1992), the Court held that state licensing acts providing for licensing of hazardous waste site workers were preempted in part by the federal Occupational Safety and Health Act, because by imposing licensing requirements the acts regulated occupational health and safety. *Id.* at 108-09 (plurality opinion), 114 (Kennedy, J., concurring). The Court recognized the regulatory nature of another common form of licensing in *South Dakota v. Opperman*, 428 U.S. 364 (1976), where it observed that "Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements." *Id.* at 368.

That licensing entails the issuance of a piece of paper does not convert the government's regulatory action into a transfer of government property. As explained in *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991),

> the mere issuance of a document designed to formalize the government's regulation does not thereby create a property interest for the government.

> The government's interest in issuing its licenses ancillary to its regulatory program is no different than its interest in propounding and enforcing its other regulations with broad based applications that do not include the issuance of licenses. Whether it chooses to use licenses or blanket rules, the government's purpose is to control the private use of private property. Thus, a regulatory license is nothing more than a formal embodiment of "the necessary government approval."

Id. at 417 (quoting *United States v. Evans*, 844 F.2d 36, 37 (2d Cir. 1988)).

In some circumstances, and for some purposes, a license may constitute property in the hands of the *licensee*. But even when that is true, it does not follow that *the government* is deprived of property when it issues the license. As Judge Easterbrook wrote for the Seventh Circuit, in an opinion joined by Judge Posner,

> The license may be property from the [licensee's] perspective, in the sense that he may not be compelled to surrender the entitlement except on proof of wrongdoing. For constitutional purposes an entitlement depending on substantive criteria is "property." From the government's perspective, however, the license is a promise not to interfere rather than a sliver of property.

Toulabi v. United States, 875 F.2d 122, 125 (7th Cir. 1989) (citations omitted).[16] *Accord United States v. Shotts*, 145 F.3d 1289, 1296 (11th Cir. 1998) ("The right of due process prior to revocation of a license . . . exists only in the hands of the licensee. If this is property, it is not the state's property."), *cert. denied*, 525 U.S. 1177 (1999).

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[16] Judge Ripple also "join[ed] the basic reasoning" of the opinion and wrote separately solely to address a procedural issue not pertinent here. 875 F.2d at 126.

2. A Majority of the Circuits Have Held That the Government Does Not Part with Property When It Issues a License.

The great weight of authority in the lower courts confirms that a governmental entity is not deprived of property under the mail or wire fraud statutes when it issues a license. For example, the Second Circuit has ruled that the State Department did not part with property when it issued export licenses allowing shipment of ammunition and other arms to foreign purchasers, *United States v. Schwartz*, 924 F.2d 410, 417 (2d Cir. 1991), and that the State of New York was not deprived of property when it issued a waste transporter permit. *United States v. Paccione*, 949 F.2d 1183, 1197 (2d Cir. 1991), *cert. denied*, 505 U.S. 1220 (1992).[17]

In *United States v. Murphy*, 836 F.2d 248 (6th Cir.), *cert. denied*, 488 U.S. 924 (1988), the Sixth Circuit held that an allegedly false application for a license to conduct charitable bingo games could not be the basis of a mail fraud charge. The court concluded that "Tennessee's right to accurate information with respect to its issuance of bingo permits" was not a property interest and thus could not support the conviction. 836 F.2d at 254. Although the court noted that "the certificate of registration or the bingo license may well be 'property' once issued, insofar as the charitable organization is concerned," that was not enough because "certainly an unissued certificate of registration is not property of the State of Tennessee and once issued, it is not the property of the State of Tennessee." *Id.* at 253-54.

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[17] *See also Evans*, 844 F.2d at 38, 40-42 (Federal Government's right to prohibit a foreign country from transferring United States arms to another foreign country without the consent of the United States was not property under the mail and wire fraud statutes); *United States v. Ferrara*, 701 F. Supp. 39, 42 (E.D.N.Y.) (license to practice medicine was not property under mail fraud statute), *aff'd mem.*, 868 F.2d 1268 (2d Cir. 1988).

The Seventh Circuit reached a similar result in a case involving taxicab drivers' licenses. *Toulabi*, 875 F.2d 122. Toulabi had caused the City of Chicago to issue licenses to persons not entitled to receive them. *Id.* at 123. The Seventh Circuit set aside his conviction, holding that the City had not relinquished property when it issued the licenses. *Id.* at 125. The court emphasized that the defendant's conduct "did not deprive Chicago of property; it fattened the City's treasury by $50 (the license fee) for each extra license issued." *Id.* In a subsequent case, the Seventh Circuit rejected an attempt to predicate a mail fraud charge on a deprivation of the Bureau of Alcohol, Tobacco and Firearms' right to control the importation of firearms. *United States v. F.J. Vollmer & Co.*, 1 F.3d 1511 (7th Cir. 1993). The court held that, although "firearms cannot be imported without a license from BATF," the agency's right to control importation is "a regulatory interest," not a "property interest." *Id.* at 1520-21.

In *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990), *cert. denied*, 500 U.S. 921 (1991), the Eighth Circuit held that "licensing authorities have no property interest in licenses or permits, and allegations that they were obtained by fraud are not sufficient to state an offense under Section 1341." 908 F.2d at 280. Accordingly, the court ordered stricken from a mail fraud charge an allegation that the defendant caused the Missouri Department of Revenue to issue a school bus operator's permit based on false statements contained in a permit application. *Id.*[18]

The Ninth Circuit twice has held that the issuance of a license is not a deprivation of property. In *United States v. Dadanian*, 818 F.2d 1443 (9th Cir. 1987), *modified on rehearing*, 856 F.2d 1391 (9th Cir. 1988), the defendants

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[18]*See also Medical, Inc. v. Amgicor Ltd.*, 677 F. Supp. 1000, 1005 (D. Minn. 1988) ("[T]he FDA does not have a cognizable property interest under the mail fraud statute in granting export approval.").

were convicted of mail fraud based on their application to the City of Bell for a poker license. 818 F.2d at 1445. The Ninth Circuit reversed, holding that "the Dadanians' scheme to obtain the gambling license did not affect the City of Bell's interests as a property-holder." 856 F.2d at 1392. The court later held that a scheme to cause the Federal Aviation Administration to issue private pilot licenses "did not affect the government's interests as a property holder." *United States v. Kato*, 878 F.2d 267, 269 (9th Cir. 1989).

The Eleventh Circuit reached a similar conclusion in *United States v. Shotts*, 145 F.3d 1289. Agreeing with the Seventh Circuit that "from the government's perspective the license is 'a promise not to interfere rather than a sliver of property,'" the court ruled that "under Alabama law, a municipal license to operate a bail bonds business is not government property" and therefore cannot support a mail fraud charge. *Id.* at 1296-97 (quoting *Toulabi*, 875 F.2d at 125).

While not dealing with licenses *per se*, the Federal Circuit and the Fourth Circuit have issued decisions that are consistent with the foregoing authority. The Federal Circuit recently ruled that the United States Patent and Trademark Office ("PTO") does not lose "property" when it issues a patent. *Semiconductor Energy Lab. Co. v. Samsung Elecs. Co.*, 204 F.3d 1368 (Fed. Cir. 2000). An alleged patent infringer had brought civil RICO counterclaims against the patent holder, alleging that the latter committed mail fraud by obtaining a patent through "material misrepresentations to the PTO using the U.S. mail." *Id.* at 1379. The RICO counterclaims were properly dismissed, the Federal Circuit held, because the "PTO has not been defrauded of property." *Id.* at 1380. Although "'a patent is property,'" *id.* (quoting *Hartford-Empire Co. v. United States*, 323 U.S. 386, 415 (1945)), the challenged conduct "did not 'defraud' the government of any 'property' under either the federal mail or

wire fraud statutes." 204 F.3d at 1380. *See also Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1137 (4th Cir. 1993) (abbreviated new drug applications in the hands of the FDA and awaiting approval are not property of the government under the mail fraud statute), *cert. denied*, 510 U.S. 1197 (1994).

3. Absent a Clear Statement by Congress, a Statute Will Not Be Construed as Significantly Altering the Federal-State Balance.

"'[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.'" *Jones v. United States*, 68 U.S.L.W. 4422, 4425 (U.S. May 22, 2000) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).[19] To allow mail or wire fraud charges to be brought whenever a state or municipal license was issued to someone who allegedly had submitted a deceptive application would dramatically expand the criminal jurisdiction of the federal government. Such an expansion would require a clear indication that Congress so intended, and there is none here.[20]

In our federal system, the "States possess primary authority for defining and enforcing the criminal law." *Brecht v.*

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[19] *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) ("'In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" (quoting *Bass*, 404 U.S. at 349)); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977) ("Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities . . . .").

[20] Indeed, the background and limited scope of the statute Congress enacted in response to *McNally* reflect an intent not to authorize use of the mail fraud statute against persons allegedly submitting false or misleading license applications. *See* Part II, *infra*.

Abrahamson, 507 U.S. 619, 635 (1993).[21] "When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and criminal jurisdiction." *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (internal quotation marks omitted). Although Congress has broad power to create federal crimes,

> Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. This congressional policy is rooted in the same concepts of American federalism that have provided the basis for judge-made doctrines. *See, e.g., Younger v. Harris*, 401 U.S. 37 (1971).

Bass, 404 U.S. at 349 (footnote omitted). Accordingly, this Court has emphasized that it "will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id.*[22]

Deception in applications for state or municipal licenses is a quintessential example of "conduct readily denounced as criminal by the States." *Id.* For example, under Louisiana law applicants for video poker licenses are subject to criminal penalties if they submit false statements in connection with their applications. La. Rev. Stat. Ann. § 33:4862.9(A) (West Supp. 1996); *see RCS Gaming, Inc. v. Louisiana Through the La. Gaming Control Bd.*, 705 So. 2d 1122 (La. Ct. App. 1997) (discussing state criminal prosecution for lying on

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[21] *See United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (same); *Kelly v. Robinson*, 479 U.S. 36, 47 (1986) ("The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States."); *Jerome v. United States*, 318 U.S. 101, 105-06 (1943).

[22] *See Jones*, 68 U.S.L.W. at 4425; *United States v. Enmons*, 410 U.S. 396, 411-12 (1973); *Rewis v. United States*, 401 U.S. 808, 811-12 (1971); *see also Williams v. United States*, 458 U.S. 279, 287 (1982).

applications for video poker licenses). In *Toulabi* Judge Easterbrook questioned why the federal mail fraud statute should be read to encompass conduct that clearly could be prosecuted under state or local laws: "Why the United States should be so interested in enforcing the laws of the City of Chicago is something of a mystery .... State and local governments commonly prosecute violations of their own laws . . . ." *Toulabi*, 875 F.2d at 123 (internal quotation marks omitted).

As Louisiana did when it directed the Office of State Police to regulate the video poker industry, *see* La. Rev. Stat. Ann. § 33:4862.8 (West Supp. 1996), States typically give the regulatory agency that runs a licensing program the power to impose administrative sanctions such as revocation and suspension. Presumptively, the sovereign that has responsibility for a licensing program should determine whether to seek sanctions based on a particular license application, and whether to use the administrative process to do so or instead to bring criminal charges. In the case of applications for state licenses, state officials are likely to be more knowledgeable of, and more sensitive to, the circumstances relevant to the choice of the appropriate sanction. State control of enforcement decisions also promotes state accountability.

Under the contrary view that issuance of a license can satisfy the requirement of a deprivation of money or property, an extremely broad range of conduct, which otherwise could not be prosecuted as a federal crime, would potentially become the subject of federal criminal charges. Approximately 600 occupations and professions are regulated by one or more states through licensure, and nearly 60 occupations and professions are regulated by more than half

the states.[23] "[I]n addition to the state laws there are municipal laws in abundance, not to mention the federal statutes that require the licensing of such diverse occupations as radio operators and stockyard commission agents."[24] It has been estimated that "as much as a third of the work force is directly affected by licensing laws."[25] Moreover, occupational licensing is only one form of licensing. Countless other activities, including driving a car, hunting, fishing, and building a home, require one or more licenses, permits, or other forms of governmental approval. In all likelihood, tens of thousands of license and permit applications are submitted every day in this country.

In the vast majority of cases, the submission, evaluation, or issuance of license applications involves the United States mail. In the unusual case where that is not true, some part of the licensing process likely will involve one or more telephone or facsimile communications. Therefore, to hold that a licensing authority parts with property under the mail and wire fraud statutes when it issues a license would allow a federal felony charge to be brought based on virtually any

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[23] *See* Pamela L. Brinegar and Kara L. Schmitt, *State Occupational and Professional Licensure*, in COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES: 1992-93 EDITION 567 (1992); *see also* COUNCIL OF STATE GOVERNMENTS, OCCUPATIONAL LICENSING LEGISLATION IN THE STATES 2, 7-8 (1952).

[24] WALTER GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 106 (1956) (footnote omitted); *see also* Walter Gellhorn, THE ABUSE OF OCCUPATIONAL LICENSING, 44 U. CHI. L. REV. 6, 6, 10 (1976) ("In recent decades occupational licensing has grown explosively."); Douglas A. Wallace, *Occupational Licensing and Certification: Remedies for Denial*, 14 WM. & MARY L. REV. 46, 46 (1972) ("In the past three to four decades, occupational licensing has become one of the most pervasive forms of state regulation of the economy.").

[25] S. DAVID YOUNG, THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA 14 (1987).

alleged deception in any state or local license application.[26] "'[I]t would require statutory language more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing'" applications for state and local licenses. *Williams v. United States*, 458 U.S. 279, 290 (1982) (quoting *United States v. Enmons*, 410 U.S. 396, 411 (1973)). There is no indication, let alone the requisite clear evidence, that Congress intended such a dramatic expansion of federal criminal jurisdiction.

C. The Court of Appeals' Ruling Incorrectly Treats a Regulatory Act as a Deprivation of Government Property.

In contrast to the majority of circuits, the Court of Appeals, in the decision it followed here, held that "Louisiana's right to choose the persons to whom it issues video poker licenses" is property under the mail fraud statute. *Salvatore*, 110 F.3d at 1140. The Third Circuit has likewise held that Pennsylvania's right to choose the persons to whom it issues medical licenses is property under the statute. *See United States v. Martinez*, 905 F.2d 709, 714 (3d Cir.), *cert. denied*, 498 U.S. 1017 (1990). *But see United States v. Allard*, 864 F.2d 248, 250-51 (1st Cir. 1989) (Breyer, Selya & Caffrey, JJ.) (observing that "*McNally* and *Carpenter* may raise questions concerning whether a medical license is property to the Commonwealth," and that "[t]he license may have no 'value' as such in the hands of the Commonwealth . . . .").[27]

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[26] The use of the mails or wires need not be an essential element of the scheme. *See Pereira v. United States*, 347 U.S. 1, 8 (1954). The defendants need not have mailed anything themselves. *See id.* And the material sent by mail or over the wires need not contain anything false or misleading. *See, e.g., Carpenter v. United States*, 484 U.S. 19, 28 (1987).

[27] *Cf. McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 793 (1st Cir.) (agreeing with the defendants' contention that the Air Traffic Conference and International Air Transport Association, in issuing

An examination of the Third and Fifth Circuit decisions shows that those courts incorrectly treated regulatory interests as property interests.

1. A principal premise of the Third and Fifth Circuit decisions was that "Under traditional property law, licensees have a protected property interest." *Salvatore*, 110 F.3d at 1143. *See also Martinez*, 905 F.2d at 713. Leaving aside for the moment the questions about the accuracy of the premise, in no event can that premise support the conclusion that the mail fraud statute applies to license applications. Whether or not a *licensee* has a property interest in a license after it has been issued, the question here is whether *the government* is deprived of property when it issues a license. *McNally* establishes that "any benefit which the Government derives from the statute must be limited to the Government's interests as property holder." 483 U.S. at 359 n.8.

The Third Circuit said it "saw no reason to make the esoteric distinction between an unissued and issued license," *Martinez*, 905 F.2d at 714, and the Fifth Circuit agreed. *Salvatore*, 110 F.3d at 1140. But this Court's decisions in *McNally* and in *Carpenter v. United States*, 484 U.S. 19 (1987), mandate an inquiry into whether the conduct charged was calculated to cause a deprivation of money or property.[28]

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approvals of contracts, were not deprived of property under the mail and wire fraud statutes, but at most were deprived of their interest in regulating the airline industry), *cert. denied*, 498 U.S. 992 (1990). In *United States v. Bucuvalas*, 970 F.2d 937 (1st Cir. 1992), *cert. denied*, 507 U.S. 959 (1993), a different panel of the First Circuit concluded that "the municipal government's interest in . . . alcoholic beverage and entertainment licenses was in the nature of a 'property' interest." 970 F.2d at 945.

[28] For example, in *United States v. Goodrich*, 891 F.2d 1011 (11th Cir. 1989), the court considered whether "the right of the citizens and government of Hillsborough County to have control over zoning decisions" is property under the mail fraud statute. *Id.* at 1015. In holding that it is not, the court distinguished between (i) a zoning decision by the

When an indictment alleges that the government was the target of the alleged scheme, those decisions require a determination of whether the scheme, if successful, would have deprived the government of money or property. Only if an indictment alleges that the holder of an issued license was the target is it necessary to determine whether the scheme, if successful, would have deprived the licensee of money or property.

It is not surprising that in some instances the outcome of these different inquiries might be different. As the Eleventh Circuit has noted, the distinction between issued and unissued licenses "seems quite clearly to be based upon the difference in the rights which attach to the license in the hands of the licensee." *Shotts*, 145 F.3d at 1296 n.13. *See also Toulabi*, 875 F.2d at 125. An issued license authorizes the licensee to engage in certain activity, which otherwise would be prohibited by law. An unissued license does not authorize the government to do anything. Nor is the government's "right to choose the persons to whom it issues . . . licenses," *Salvatore*, 110 F.3d at 1140, a property right.

Finally, the Fifth Circuit's assertion that "Under traditional property law, licensees have a protected property interest," *Salvatore*, 110 F.3d at 1143, mistakenly equates constitutional principles with traditional property law. The Fifth

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County and (ii) the rights of a property owner in conduct permitted by a zoning ordinance:

> Although the government points out that zoning decisions affect property and that arbitrary and capricious zoning decisions can constitute a deprivation of property without due process of law, . . . it does not follow that zoning decisions are themselves property. . . . Zoning classifications affect the use of property, but they are not, in themselves, property. The right to control zoning decisions also cannot be considered property.

Id.

Circuit relied upon *Mackey v. Montrym*, 443 U.S. 1, 10 (1979), *Beauchamp v. De Abadia*, 779 F.2d 773, 775 (1st Cir. 1985), and *Keney v. Derbyshire*, 718 F.2d 352, 354 (10th Cir.1983), but those decisions treated certain licenses as the licensee's property *for due process purposes*. That an interest is entitled to protection under the Due Process Clause does not mean it is property under "traditional property law." The seminal modern case expanding due process protections, *Goldberg v. Kelly*, 397 U.S. 254 (1967), did not make the existence *vel non* of a protected due process interest turn on traditional property law. Rather, the Court drew an "analogy . . . between social welfare and 'property.'" *Richardson v. Belcher*, 404 U.S. 78, 81 (1971).

Notwithstanding *Goldberg* and subsequent decisions under the Due Process Clause, even today for many purposes issued licenses, particularly business licenses, are not deemed property. *See, e.g., Club Misty, Inc. v. Laski*, 208 F.3d 615, 619 (7th Cir. 2000) (Posner, J.) ("For most purposes, perhaps for all but one purpose, an Illinois liquor license is not property; but insofar as it is revocable (or nonrenewable) only for cause, it is property for purposes of determining whether the state can deprive the licensee of it without according him due process of law."). In fact, the Louisiana video poker statute expressly provides that an issued video poker license is not property. As noted in *Montecino v. Louisiana*, 55 F. Supp. 2d 547 (E.D. La. 1999), a licensee's interest "in conducting video poker operations . . . has been declared by the legislature not to constitute a property interest." *Id.* at 552.[29]

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[29] *See* La. Rev. Stat. Ann. § 33:4862.1(D) (West Supp. 1996) ("Any license applied for, granted, or issued under the provisions of this Part is *a pure and absolute privilege*, and the awarding, denial, or withdrawal of which is solely within the discretion of the division and, except as provided in this Part, without recourse at law. Any license issued or renewed under the provisions of this Part *is not property* or a protected

2. The Third and Fifth Circuits also relied upon *Carpenter*, likening the government's right to control issuance of its licenses to the Wall Street Journal's right to control its confidential business information. The Fifth Circuit stated in *Salvatore*:

> [C]ourts define property as a legal "bundle of rights" that one possesses in connection with a particular object. Included in this bundle of property rights are the rights "to possess, use and dispose" of a particular article. *Necessarily encompassed within the right to use and dispose of an object is the right to control that object—and in the case of licenses, the right to control their issuance*. . . . Indeed, *Carpenter* itself supports the position that the right to control is included in the bundle of rights known as "property," for in that case the Supreme Court held that the defendants defrauded the Wall Street Journal of its right to control the disclosure of confidential business information.

110 F.3d at 1140 (citations omitted) (emphasis added). *See also Martinez*, 905 F.2d at 714-15.

Neither *Carpenter* nor the "bundle of rights" definition supports the court's conclusion that the State parts with property when it issues a license. *Carpenter* involved the taking of something (confidential business information) that "has long been recognized as property." *Carpenter*, 484 U.S.

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interest under the constitutions of either the United States or the state of Louisiana.") (emphasis added); *see also* La. Admin. Code, tit. 55, § 2405(D)(1) (1992) ("A license issued by the [Video Gaming] Division [of the Gaming Enforcement Section of the Office of State Police] is a pure and absolute privilege. The issuance, condition, denial, suspension or revocation of a license is at the discretion of the Division in accordance with the provisions of the Act. A license is not property or a protected interest under the Constitution of either the United States or the State of Louisiana."). There is no limit on the number of video poker licenses available; in contrast to, for example, radio licenses, applicants for video poker licenses are not competing against each other.

at 26. In contrast, apart from a minority of decisions under the mail and wire fraud statutes, courts have never recognized a state's right to control issuance of its licenses as property. To the contrary, licensing has long been recognized to be a method of regulating conduct and raising revenue. *See* pp. 17-18, *supra*.[30]

The Fifth Circuit's analysis also incorrectly assumes that a right to control is necessarily a property interest. The ownership of property may well confer on the owner "a bundle of rights," including the rights to possess, use, and dispose of the property, which in turn could be said to include the right to control the property. But it does not follow that every right of control, including the government's right to control to whom a license is issued, is a property right. *See United States v. F.J. Vollmer & Co.*, 1 F.3d 1511, 1520-21 (7th Cir. 1993) (holding that the Bureau of Alcohol, Tobacco and Firearms' right to control importation of firearms is "a regulatory interest," not a "property interest"); *United States v. Evans*, 844 F.2d 36, 41 (2d Cir. 1988) ("[T]he fact that the common law recognizes some rights to control alienation as property does not mean that all such rights are property rights within the meaning of the federal fraud statutes.").

3. In addition, the Third and Fifth Circuits relied upon a sentence in a law review article by Professor Charles Reich, which they cited for the proposition that a license "'is originally public property, comes from the state, and may be

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[30] *Cf. United States v. Bruchhausen*, 977 F.2d 464, 468 (9th Cir. 1992) ("*Carpenter* relied in part on the fact that '[c]onfidential business information has long been recognized as property.' There is no comparable understanding that a manufacturer has a property interest in the destination of its products. Of course the manufacturer may have an interest in assuring that its products are not ultimately shipped in violation of law, but that interest in the disposition of goods it no longer owns is not easily characterized as property.") (quoting *Carpenter*, 484 U.S. at 26) (citation omitted).

withheld completely.'"[31] For several reasons, Professor Reich's article provides no support for the courts' interpretation of the mail fraud statute. First, property for purposes of the mail fraud statute is "something that fairly deserves the label of property *under traditional usage*." *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (R. Arnold, J.) (emphasis added), *cert. denied*, 500 U.S. 921 (1991).[32] In *Carpenter* this Court cited case law, a statute, and a well-known treatise to demonstrate that confidential business information "has long been recognized as property." *Carpenter*, 484 U.S. at 26. A single sentence in a single law review article does not come close to showing that issuance of a license has traditionally been understood to be a transfer of the government's property. Second, for whatever the article may be worth, nowhere does it say that a license—as opposed to other forms of "largess" such as Social Security benefits, welfare, income from government jobs, and

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[31] *Salvatore*, 110 F.3d at 1141 (quoting Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 778 (1964)); *see also Martinez*, 905 F.2d at 715.

[32] *See also United States v. Bruchhausen*, 977 F.2d 464, 467 (9th Cir. 1992) (potential government interest "too ethereal to fall within the protections of a statute that 'had its origin in the desire to protect individual property rights'" (quoting *McNally v. United States*, 483 U.S. 350, 359 n.8 (1987)); *United States v. Holzer*, 840 F.2d 1343, 1348 (7th Cir.) (Posner, J.) (concluding that the money-or-property requirement was not satisfied where the object of the charged scheme was property of the alleged victim "only in an attenuated and artificial sense," *i.e.*, under a constructive-trust theory), *cert. denied*, 486 U.S. 1035 (1988); *cf. United States v. Miller*, 997 F.2d 1010, 1020 (2d Cir. 1993) (following *Holzer* and holding that a constructive-trust theory was insufficient to satisfy the money-or-property requirement); *United States v. Walgren*, 885 F.2d 1417, 1424 (9th Cir. 1989) (same); *Goodrich*, 871 F.2d at 1014-15 (same); *United States v. Shelton*, 848 F.2d 1485, 1492 (10th Cir. 1988) (en banc) (same); *United States v. Ochs*, 842 F.2d 515, 525-27 (1st Cir. 1988) (rejecting constructive-trust theory).

subsidies to business — is originally public property.[33] Third, the article cites no case that says so.

Finally, licenses are fundamentally different from other forms of "largess" addressed by Professor Reich. Of course money paid by the government to Social Security recipients and others was originally public property, but the same is not true of licenses. "[T]he fact that an individual's property 'originated in' or 'came from' the government in no way compels the conclusion that it was originally government *property*." Comment, *License Procurement and the Federal Mail Fraud Statute*, 58 U. CHI. L. REV. 1125, 1146 (1991) (emphasis in original).

4. The *Salvatore* court insisted that Louisiana has "a property interest in its licenses" because the operations of video poker license holders provide "significant revenues" to the State. 110 F.3d at 1141-42. In addition to an annual fee, the State receives 22.5% of each licensee's net device

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[33] The article advances various observations and theories about eight forms of "largess": benefits such as Social Security and welfare, income from government jobs, occupational licenses, franchises, contracts, subsidies, use of public resources, and services. *See* 73 YALE L.J. at 734-37. The sentence seized on by the Third and Fifth Circuits states that "The chief obstacle to the creation of private rights in largess has been the fact that it is originally public property, comes from the state, and may be withheld completely." *Id.* at 778. This sentence merely purports to summarize an objection raised by others to recognizing private rights in government "largess." It is hardly an assertion that occupational licenses in particular—only one of the eight forms of largess discussed in the article—are property of the government before issuance. The reference to "[t]he chief obstacle" to recognition of private rights would naturally denote the most frequently heard objection, not necessarily an objection applicable to *every* form of largess. The objection is one that applies, not to occupational licenses, but to other forms of "largess," including the first two forms that the article discusses, *i.e.*, benefits such as Social Security and welfare, and income from government jobs, which in combination exceeded $100 billion each year. *See id.* at 734, 737.

revenue. *Id.* at 1142. But the fact that the State *receives* money from the licensee in no way suggests that the State is *deprived* of property when it issues the license. Just as the defendant's conduct in *Toulabi* "did not deprive Chicago of property; it fattened the City's treasury by $50 (the license fee) for each extra license issued," 875 F.2d at 125, in Louisiana the State's treasury is "fattened" both when it receives the annual fees and when it receives a share of net device revenue. The State is actually receiving money, not being deprived of property.

D. The Majority View in the Circuit Courts Is Supported by the Rule of Lenity.

Even if this Court considered the mail fraud statute ambiguous as applied to alleged schemes to obtain government licenses, reversal would be required under the principle that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Jones v. United States*, 68 U.S.L.W. 4422, 4425 (U.S. May 22, 2000) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).[34] This interpretive guide serves "to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

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[34] *See United States v. Granderson*, 511 U.S. 39, 54, 56 (1994); *Ratzlaf v. United States*, 510 U.S. 135, 148 (1994); *Hughey v. United States*, 495 U.S. 411, 422 (1990); *Crandon v. United States*, 494 U.S. 152, 158 (1990); *McNally v. United States*, 483 U.S. 350, 359-60 (1987) (interpreting the mail fraud statute); *Tanner v. United States*, 483 U.S. 107, 131 (1987); *Liparota v. United States*, 471 U.S. 419, 427 (1985); *Dowling v. United States*, 473 U.S. 207, 213-14, 229 (1985); *Williams v. United States*, 458 U.S. 279 (1982); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952); *Fasulo v. United States*, 272 U.S. 620, 629 (1926) (interpreting the mail fraud statute).

The third of these purposes bears emphasis here. As the Court cautioned in *United States v. Bass*, 404 U.S. 336 (1971),

> [B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should."

Id. at 348 (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 196, 209 (1967)). There has been no legislative determination that the mail fraud statute should extend beyond schemes to deprive someone of money or property, and reach schemes that seek only issuance of a government license.

Congress is the proper forum for the Government to press its view that schemes involving license applications should be punishable as mail fraud. *Cf. United States v. Maze*, 414 U.S. 395, 405 n.10 (1974) ("If the Federal Government is to engage in combat against fraudulent schemes not covered by the [mail fraud] statute, it must do so at the initiative of Congress and not of this Court."). Congress of course could agree with the Government, but Congress also could well decide that it would be unjust to treat such schemes as mail fraud. The offense of mail fraud is not only punishable by up to five years' imprisonment, but is also a predicate offense under RICO, *see* 18 U.S.C. § 1961(1), and thus under the money laundering statute as well. *See* 18 U.S.C. § 1956(c)(7)(A). Those statutes authorize sentences of up to 20 years' imprisonment. *See* 18 U.S.C. §§ 1956(a), 1963(a). Long prison terms are common under the RICO and money laundering statutes (and often required absent a downward departure), as this case illustrates. Although petitioner did not sign any of the license applications or even see them

before they were submitted, he was sentenced to ten years and one month in prison. "[T]he wisdom of leaving it to the legislature to define crime and prescribe penalties," *Dowling v. United States*, 473 U.S. 207, 228 (1985), is further reason to reject the Court of Appeals' expansive interpretation.

In *Salvatore* the Fifth Circuit made no mention of lenity and instead "beg[a]n with the proposition that the concept of property rights should be given a broad interpretation for the purposes of the mail fraud statute." 110 F.3d at 1139. Ultimately, however, that proposition stems from a misreading of *McNally*. The *Salvatore* court relied upon the Fifth Circuit's prior statement in *United States v. Loney*, 959 F.2d 1332 (5th Cir. 1992), that "we construe 'property' in a broad sense for purposes of the federal fraud statutes." *Id.* at 1336. But the sole authority the *Loney* court cited in support of that statement was the following passage from *McNally*:

> *Durland v. United States*, 161 U.S. 306 (1896), the first case in which this Court construed the meaning of the phrase "any scheme or artifice to defraud," held that the phrase "any scheme or artifice to defraud" is to be interpreted broadly insofar as property rights are concerned.

McNally, 483 U.S. at 356. As the Second Circuit has explained in rejecting the Government's argument that this passage supports a broad interpretation of property rights, "This quotation means that once a property right is found, any attempt to take the right by trickery is punishable, but it implies nothing about when to find a property right." *Evans*, 844 F.2d at 40. That the Second Circuit is correct is apparent from *Durland*, which the *McNally* Court described in the disputed passage. Nothing in *Durland* suggests that the mail fraud statute embodies a broad concept of property.[35]

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[35] In *Martinez* the Third Circuit also relied upon the notion that the mail fraud statute should be accorded a broad interpretation, citing

II. CONGRESS'S ACTION AFTER *MCNALLY* DEMONSTRATES THAT IT DID NOT INTEND THE MAIL FRAUD STATUTE TO COVER DECEPTIONS IN STATE LICENSE APPLICATIONS.

An additional ground for reversal is Congress's decision in 1988 to restore only one "intangible right," not involving money or property, that had been recognized in the lower courts before *McNally*. The sole change Congress made in 1988 was to bring within the mail fraud statute (and certain other fraud statutes) "a scheme or artifice to deprive another of the intangible right of honest services."[36] The Court of Appeals' decision here is contrary to Congress's intent, because that decision effectively recognizes another intangible right, the right to run a licensing program based on full and complete information. Congress did not restore that right even though it knew that indictments for alleged licensing fraud, which had been based on such an intangible right, had been dismissed in reliance upon *McNally*.

Prior to *McNally*, numerous lower court decisions had approved application of the mail fraud statute to schemes involving deprivation of "intangible rights," whether or not anyone's money or property was implicated. One line of cases allowed mail fraud charges to be based on schemes calculated to deprive the victim of the right to the honest services of an agent or employee. *See, e.g., United States v.*

Congress's action in 1988 in providing that a "scheme to defraud" includes a scheme to deprive another of the intangible right of honest services. *Martinez*, 905 F.2d at 715. As demonstrated in Part II, *infra*, Congress's response to *McNally* in fact indicates that it did not intend to authorize use of the mail fraud statute as a vehicle for punishing alleged deception in license applications.

[36] Anti-Drug Abuse Act of 1988, Pub. L. 100-690, Title VII, § 7603(a), 102 Stat. 4181, 4508 (Nov. 18, 1988) (codified at 18 U.S.C. § 1346).

Von Barta, 635 F.2d 999, 1006-07 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981); *United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980). Other cases approved charges predicated on other "intangible rights," including "the right to conscientious, loyal, faithful, disinterested and honest government;"[37] a client's right to the "undivided loyalty" of his attorney;[38] and an electoral body's "political rights to fair elections free from dilution from the intentional casting and tabulation of false, fictitious or spurious ballots."[39] In combination such decisions resulted in "'an extraordinary expansion of the mail and wire fraud statutes to permit federal prosecution for conduct that some had thought was subject only to state criminal and civil law.'" *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 502 (1985) (Marshall, J., joined by Brennan, Blackmun & Powell, JJ., dissenting) (quoting *United States v. Weiss*, 752 F.2d 777, 791 (2d Cir.) (Newman, J., dissenting in part), *cert. denied*, 474 U.S. 944 (1985)).

This expansion led some prosecutors to bring mail fraud charges based on alleged deception in state license applications, and to describe an "intangible right" of which the state agency was purportedly defrauded. For example, in *United States v. Green*, 577 F. Supp. 935 (N.D. Cal. 1984), a mail fraud charge was in part based on allegations of a scheme "'to defraud the California Department of Motor Vehicles of its right to have its California Driver's License

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[37] *United States v. Mandel*, 591 F.2d 1347, 1359 (4th Cir.), *aff'd en banc in relevant part*, 602 F.2d 653 (1979), *cert. denied*, 445 U.S. 961 (1980). *See United States v. Isaacs*, 493 F.2d 1124, 1150 (7th Cir.) ("The citizens of Illinois were defrauded of Kerner's honest and faithful services as governor."), *cert. denied*, 417 U.S. 976 (1974).

[38] *United States v. Bronston*, 658 F.2d 920, 927 (2d Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

[39] *United States v. Clapps*, 732 F.2d 1148, 1152 (3d Cir.), *cert. denied*, 469 U.S. 1085 (1984).

program administered free from falsehood and deceit.'" *Id.* at 936 (quoting indictment). The court held that the indictment alleged "a sufficient 'intangible right'" to state an offense. *Id.* at 937. Similarly, in *United States v. Murphy*, 836 F.2d 248 (6th Cir.), *cert. denied*, 488 U.S. 924 (1988), the defendant was convicted under an indictment alleging a scheme "'to defraud the State of Tennessee of the right to issue certificates of registration to charitable organizations to conduct bingo games, based on complete, true and accurate information to be provided by those applying for said permits.'" 836 F.2d at 251 (quoting indictment). The Government also prosecuted former Tennessee Governor Ray Blanton for mail fraud, in part based on allegations of a scheme to defraud "the State, its citizens, officers, employees and applicants for retail liquor licenses of their right to have the business of the Alcoholic Beverage Commission conducted honestly" and in accordance with certain statutes, rules, and regulations. *See United States v. Blanton*, No. 3-86-0593, 1988 WL 182378, at *2 (M.D. Tenn. Jan. 27, 1988).

The defendants in both *Murphy* and *Blanton* were convicted of mail fraud, but shortly after *McNally* their convictions were vacated and the indictments were dismissed. *See Murphy*, 836 F.2d at 257; *Blanton*, 1988 WL 182378, at *6. In each case the court held that the charges had depended upon an intangible right, and that the licensing authorities had not parted with property in issuing the licenses. *Murphy*, 836 F.2d at 253-54; *Blanton*, 1988 WL 192378, at *4-5. Both cases were decided in January 1988.

Although it would be appropriate to presume that Congress was aware of these developments,[40] the legislative history confirms that Congress knew of the adverse effect of *McNally* on mail fraud prosecutions for alleged deception in obtaining

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[40] *See, e.g., Johnson v. Home State Bank*, 501 U.S. 78, 86 (1991); *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979).

licenses. For example, on the day the House of Representatives approved what is now 18 U.S.C. § 1346, the fact that indictments alleging licensing fraud had been dismissed as a result of *McNally* was specifically discussed on the House floor. *See* 134 Cong. Rec. 33296 (1988) (statement of Rep. Conyers):

> The Subcommittee on Criminal Justice, which I chair, held a hearing on the McNally decision on May 12, 1988. At that hearing John C. Keeney, Acting Assistant Attorney General for the Criminal Division, U.S. Department of Justice, testified that as a result of the McNally decision many significant prosecutions of political corruption brought under the mail and wire fraud statutes have been dismissed or overturned on appeal. Mr. Keeney pointed out that cases involving bribery, money laundering, election fraud, and *licensing fraud* have been dismissed because there was no monetary loss to any victim.

(Emphasis added).[41]

In these circumstances, it is significant that Congress did *not* provide that a scheme to defraud may consist of scheme to deprive a governmental entity of an "intangible right" such as the right to administer a licensing program based on full and complete information. Bills were introduced that would have recognized a wide range of "intangible rights" and

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[41] *See also* 134 Cong. Rec. 15045 (1988) (statement of Sen. McConnell) (citing the Sixth Circuit's decision in *Murphy*, with the description "indictment charging state official with scheme to cause State to issue a bingo license based on untrue information dismissed under McNally"); *Mail Fraud: Hearing on H.R. 3089 Before the Subcomm. on Criminal Justice of the House Judiciary Comm.*, 100th Cong. 8 (May 12, 1988) ("*Hearing*") (testimony of Acting Assistant Attorney General Keeney explaining that as a result of *McNally*, cases involving "licensing fraud" had been dismissed); *id.* at 14-15 & n.5 (prepared statement of Mr. Keeney noting that cases involving licensing fraud had been dismissed because of *McNally*, and citing the Sixth Circuit's decision in *Murphy*).

plainly would have authorized prosecution of alleged deception in licensing applications, but Congress opted instead to enact much narrower legislation.

Some in Congress favored broad legislation that would have authorized mail fraud prosecutions based on a broad spectrum of "intangible rights." The broadest set of bills, introduced by Representative Conyers and Senator Specter, would have provided, *inter alia*, that in Title 18 "The term 'fraud' or 'defraud' includes defrauding another – (1) of intangible rights *of any kind whatsoever in any manner for any purpose whatsoever.*"[42] Another bill, introduced by Representative Mfume, would have listed numerous "intangible rights" that could support prosecution. It would have provided that, for purposes of the mail, wire, and bank fraud statutes,

> the term "defraud" includes the defrauding of the citizens of a body politic—
>
> (1) of their right to the conscientious, loyal, faithful, disinterested, and unbiased performance of official duties by a public official thereof; or
>
> (2) or their right to have the public business conducted honestly, impartially, free from bribery, corruption, bias, dishonesty, *deceit*, official misconduct, and fraud.[43]

Either the Specter/Conyers proposal or the Mfume proposal would have covered the intangible right at issue in this case, "Louisiana's right to choose the persons to whom it issues video poker licenses." *Salvatore*, 110 F.3d at 1140.

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[42] H.R. 3089, 100th Cong. § 2 (1987), introduced 133 Cong. Rec. 22313 (1987) (emphasis added); S. 1898, 100th Cong. § 2, introduced 133 Cong. Rec. 33253 (1987) (emphasis added).

[43] H.R. 3050, 100th Cong. § 2 (Rep. Mfume), introduced 133 Cong. Rec. 21469 (1987) (emphasis added).

There was opposition, however, to such broad legislation—both from members of Congress and from the Administration. For example, Senator McConnell was convinced that *McNally* was "on solid legal ground," though he recognized the need for new legislation to address government corruption.[44] The Department of Justice also concluded that the appropriate response to *McNally* was enactment of a new public corruption offense.[45] Along with Senator Thurmond, Senator McConnell introduced, as an alternative to bills changing the definition of "defraud," a bill that would have created a new federal offense, public corruption.[46] "This legislation," Senator McConnell explained, "was prepared and approved by the Justice Department . . ."[47] The legislation would have made it a felony punishable by up to ten years in prison to engage in "any scheme or artifice corruptly to defraud or deprive the inhabitants of a State or political subdivision of a State of *the honest services* of an official or employee."[48] Representative Michel and 105 co-sponsors introduced a similar bill in the House.[49]

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[44] 134 Cong. Rec. 15045 (1988) (reprinting newspaper editorial by Senator McConnell, which he asked to include in the Congressional Record).

[45] *See Hearing*, at 8-37 (testimony and prepared statement of Acting Assistant Attorney General Keeney).

[46] Anti-Public Corruption Act of 1988, S. 2531, 100th Cong. (1988), introduced 134 Cong. Rec. 15123 (1988).

[47] 134 Cong. Rec. 15041 (1988).

[48] S. 2531, sec. 2(a), § 225(a) (emphasis added).

[49] Comprehensive Anti-Drugs Act of 1988, H.R. 4842, Subtitle J, sec. 2102(a), § 225(a), 100th Cong. 134, introduced Cong. Rec. 14854 (1988). *See also* H.R. 4871, 100th Cong. (1988), introduced 134 Cong. Rec. 15469 (1988) (Rep. Gekas) (utilizing same format as McConnell-Thurmond bill rather than including proposed provision in anti-drug bill).

Ultimately, Congress decided not to create a new offense of public corruption. It did embrace, however, the concept at the heart of the approach advocated by Senators McConnell and Thurmond, Representative Michel and 105 others in the House, and the Department of Justice—namely, that what was in need of protection was the right of honest services. Congress chose to safeguard that right by specifying that, for purposes of the mail, wire, and bank fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible rights of honest services." [50] Congress did not restore any other intangible right. Neither the bills covering all intangible rights that had been introduced by Senator Specter and Representative Conyers, nor Representative Mfume's bill covering (among other things) the intangible right to have the public business conducted free from deceit, was ever passed.

In short, Congress knew that indictments based on applications for licenses had been dismissed in reliance upon *McNally*, bills were introduced that would have restored intangible rights that could have been used to prosecute alleged deception in license applications, and Congress chose to pass instead a bill restoring only the intangible right of honest services. The only reasonable inference is that Congress did not intend the mail fraud statute to be a vehicle for prosecuting alleged false statements or omissions in license applications, nor did it intend to restore any intangible right other than the intangible right of honest services. In *McNally* this Court had plainly said: "If Congress desires to go further, it must speak more clearly than it has." 483 U.S. at 360. Congress did decide to go further, but only as to one intangible right.

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[50] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4181, 4508 (1988) (codified at 18 U.S.C. § 1346).

This is an additional reason to reverse the decision below. By affirming convictions based on alleged false statements and omissions in applications for video poker licenses, that decision in effect reads into the mail fraud statute an intangible right to administer a licensing program based on full and complete information. That is an intangible right Congress did not restore.[51]

CONCLUSION

Petitioner was charged with participating in a scheme to deprive "the State of Louisiana and its citizens" of "property" by "fraudulently obtaining and renewing, through the submission of false and incomplete information, state licenses to operate video poker sites." R. 441. Because the mail fraud statute, properly construed, does not cover a scheme or artifice to obtain a video poker license, petitioner's mail fraud convictions cannot stand.

The invalidity of the mail fraud counts requires that petitioner's money laundering, RICO, and RICO conspiracy convictions also be reversed. In granting petitioner's application for release pending the decision of this Court, the District Court recognized that "A Supreme Court decision in Cleveland's favor would lead to reversal of his mail fraud convictions, as well as his money laundering, RICO, and RICO conspiracy convictions." Order and Reasons, April 27, 2000, at 4. The money laundering convictions must be reversed because petitioner was acquitted of illegal gambling, the only alleged "specified unlawful activity" besides mail

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[51] The language employed by the Government in the indictment here is reminiscent of the expressions common in the pre-*McNally* era when numerous intangible rights were recognized, including ones relating to licensing programs. *See* R. 441 (alleging a scheme "to defraud the State of Louisiana *and its citizens*" (emphasis added)); *see also Martinez*, 905 F.2d at 714 (referring in part to what the "people" of Pennsylvania purportedly lost as a result of a false license application).

fraud alleged in the money laundering charges. R. 444. Petitioner's RICO conviction must be reversed because, without the alleged predicate acts of mail fraud and money laundering, the two predicate acts required for a RICO conviction would be lacking. R. 422-27. *See, e.g., United States v. Sanders*, 929 F.2d 1466, 1473 (10th Cir.), *cert. denied,* 502 U.S. 846 (1991). And his RICO conspiracy conviction must be reversed because it surely was based on a finding of a conspiracy to commit a purported RICO offense involving one or both of those alleged predicate acts, R. 422-24, 428. *See Salinas v. United States*, 522 U.S. 52, 65 (1997) (RICO conspiracy charges are governed by the principle that "A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense . . . .").

The District Court's error in denying the motion to dismiss the mail fraud counts and alleged predicate acts of mail fraud also requires reversal as to the tax counts.[52] As a result of the error, when the jury considered the tax counts (Counts 13 and 15), it already had found petitioner guilty on eight different counts (Counts 1, 2, 5, 6, 8, 9, 10, and 12) charging four different felonies (racketeering, racketeering conspiracy, mail fraud, and money laundering). R. 90–91. Every one of those other convictions depended on the invalid premise that Louisiana was deprived of property when it issued video poker licenses. Particularly because the Government married its case on the tax counts to its case on the other counts, T. 4683 (government argues in summation that "It's really not a tax case so much. It's a truth case. . . . The same lies we have seen over and over again pop up here."), it is impossible to say with confidence that the verdict on the tax counts

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[52] The District Court came to a contrary conclusion in its order granting release. *See* Order and Reasons, April 27, 2000, at 5.

would have been the same if the jury had considered those counts on a clean slate.

For the reasons stated, the judgment of the Court of Appeals should be reversed.

Respectfully Submitted,

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